THE PUBLIC LAWYER
APRIL 5, 2004

NEVADA CASES

http://www.leg.state.nv.us/scd/OpinionListPage.cfm

Rudin v. State, 120 Nev. Adv. Op. 17 (April 1, 2004). "This is an appeal from a judgment of conviction on Count I, unauthorized surreptitious intrusion of privacy by listening device and Count II, murder with use of a deadly weapon. Appellant Margaret Rudin argues that she is entitled to a new trial because: (1) the district court abused its discretion by admitting unreliable expert testimony, (2) the State deprived her of her right to a fair trial by engaging in repeated instances of prosecutorial misconduct, (3) the district court deprived her of her right to a fair trial by engaging in repeated instances of judicial misconduct, and (4) one of her trial counsel was unable to adequately prepare for trial depriving her of her right to a fair trial. We conclude that Rudin's arguments are without merit and, accordingly, we affirm the judgment of conviction."

State, Dep't of Human Resources v. Estate of Ulmer, 120 Nev. Adv. Op. 16 (April 1, 2004). "In this appeal, we consider whether imposing a lien on a deceased Medicaid recipient's interest in a home before the surviving spouse's death[2] constitutes a "recovery" in violation of federal and state Medicaid estate recovery law. We conclude that imposing a lien is not an impermissible "recovery." The State may impose a lien, subject to certain limitations, before the surviving spouse's death upon property in which it has a legitimate interest. However, to prevent spousal impoverishment, the lien must provide that the government release the lien upon the surviving spouse's demand pursuant to any bona fide sale or financial transaction involving the home. We further conclude that Nevada's lien statute requires that the notice of lis pendens, lien proceedings, and the lien itself provide clear and unequivocal notice that the lien is limited to the government's interest in the property, which would include mandatory release provisions.

Because the State sought to impose overly broad liens, we affirm the order granting injunctive relief for the individually

named surviving spouses."

Simmons v. Simmons, 120 Nev. Adv. Op. 15 (April 1, 2004). "In this appeal, we primarily consider whether the district court, in granting a motion to change child custody, properly considered evidence of domestic violence that occurred before the parties' divorce decree was entered. We conclude that a party seeking to change custody may introduce evidence of domestic violence if he or she or the district court was unaware of the existence or extent of the conduct when the prior custody order was entered. Consequently, in this case, the district court did not err in considering the pre-decree domestic violence evidence."

Ringle v. Bruton, 120 Nev. Adv. Op. 14 (April 1, 2004). "We have not previously decided whether an employee who continues to work for an employer after the expiration of a contract of employment becomes an at-will employee. We do so now. We conclude that when an employee continues to work after his contract of employment expires, it is presumed that all the terms of the employment contract continue to govern the conduct of the employer and the employee until the parties properly amend or terminate the contract or until the employee ceases working for the employer. The contract duration, however, does not renew."

Redl v. Heller, 120 Nev. Adv. Op. No. 13 (March 12, 2004). "In this petition for a writ of mandamus, petitioner challenges the Secretary of State's revival of a revoked corporate charter after a five-year period. We conclude that under NRS 78.730, the Secretary of State has discretion to revive a corporate charter that has been revoked for a period of five or more years. We therefore deny the petition."

11/22/03: An article co-authored by Professor David Hricik of Mercer Law School, discusses meta-data and notes that at least one bar association has said that lawyers may not review meta-data that often accompanies Word documents.

http://www.legalethics.com/

02/04/04: Microsoft has announced a new software add-on –"remove hidden data tool" -- that, purportedly, will remove meta-data from Word documents, a problem discussed in the article noted below.

Overview

With this add-in you can permanently remove hidden and collaboration data, such as change tracking and comments, from Word 2003/XP, Excel 2003/XP, and PowerPoint 2003/XP files.

When you distribute an Office document electronically, the document might contain information that you do not want to share publicly, such as information you've designated as "hidden" or information that allows you to collaborate on writing and editing the document with others.

The Remove Hidden Data add-in is a tool that you can use to remove personal or hidden data that might not be immediately apparent when you view the document in your Microsoft Office application.

You can run the Remove Hidden Data add-in on individual files from within your Office XP or Office 2003 application. Or, you can run Remove Hidden Data on multiple files at once from the command line. In either case, to run the tool you must have the application installed in which the document was created.

The Offrhdreadme.htm file included with the add-in includes a complete list of all of the types of data that the tool will help to remove. By default, you can locate this file in the \Program Files\Microsoft Office\Remove Hidden Data Tool\1033 directory in the drive where you installed the tool. If you installed the tool to a different directory, you can locate this file in the \1033 directory, a subdirectory of the add-in installation folder.

Notes

You should run the Remove Hidden Data add-in on files when you are ready to publish them. This is because some of the data that the tool removes is used by Office for collaboration features, such as Track Changes, Comments, and Send for Review.

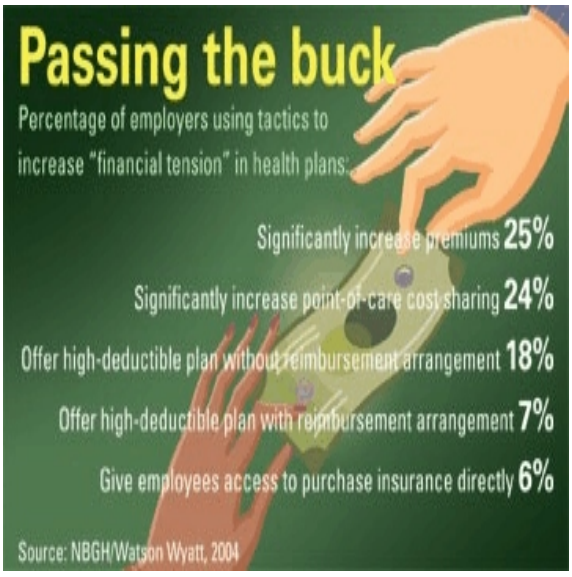
You should always save to a new file name, rather than overwrite the original file with the new document, in order to preserve a copy of the document containing the original data.

The Remove Hidden Data add-in does not work with Information Rights Management-protected or digitally-signed files.

"The poor guys ought to get something." FEES: California Supreme Court Allows Quantum Meruit Despite Failure to Get Written Client Consent to Fee-Sharing.

Huskinson & Brown ("H&B") referred a medical malpractice client to Appell & Wolf ("A&W"). In consideration for the referral, A&W agreed orally to pay H&B 25 percent of fees A&W recovered. While A&W took responsibility for the case, H&B paid $800 to an expert and did 20 hours of work on the case. A&W managed to obtain a $250,000 recovery for the client, but refused to remit 25 percent of the fee to H&B. H&B then sued A&W for the 25 percent share of the fee or, in the alternative, for quantum meruit. In Huskinson & Brown, LLP v. Wolf, 32 Cal. 4th 453 (Cal. 2004), the court noted that California Rule of Professional Responsibility 2-200 requires, as does the ABA equivalent, Model Rule 1.5(e), that the agreement be disclosed to the client in writing and that the client consent in writing. Neither happened here. The California Supreme Court took it as given that the 25 percent agreement was not enforceable. The court then considered whether H&B could recover for its time, which the trial court had valued at $5,000 ($250/hour). The court, citing only California cases and opinions, held that it could.

Huskinson & Brown, LLP v. Wolf, 32 Cal. 4th 453 (Cal. 2004).
<http://www.ethicsandlawyering.com/Issues/files/Huskinson.pdf>



NINTH CIRCUIT CASES

(Cases without hyerlinks can be found at http://www.ca9.uscourts.gov/ca9/newopinions.nsf)

Chevron USA, Inc. v. Bronster, No. 02-15867 (9th Cir. April 1, 2004). "Hawaii Governor Linda Lingle) appeals the district court's holding on remand that Section 3(c) of Act 257of the 1997 Hawaii State Legislature effects a regulatory taking in violation of the Takings Clause of the Fifth Amendment to the United States Constitution. Chevron USA, Inc. challenged the Act, which, inter alia, proscribes the maximum rent that oil companies can collect from dealers who lease company-owned service stations. We have jurisdiction pursuant to 28 U.S.C. §1331, and we affirm."

Gadda v. Ashcroft, No. 02-15113 (9th Cir. April 1, 2004). "On July 30, 2001, the California State Bar Court found that Miguel Gadda, Esq. repeatedly failed to perform legal services competently. It placed Gadda on involuntary inactive status and recommended that Gadda be disbarred. This opinion and order relate to two federal proceedings resulting from the State Bar Court's recommendation. In the first, Gadda appeals an order of the United States District Court for the Northern District of California, which denies Gadda's motion to preliminarily enjoin the Board of Immigration Appeals ("BIA") decision to suspend him from practice based on his suspension by the State Bar Court. Gadda v. Ashcroft, No. 02-15113. Gadda asserts that the State Bar Court cannot affect his right to practice before the BIA. The other proceeding is a disciplinary action initiated by this court after we received notice of Gadda's suspension from practice by the State Bar Court. Gadda argues that any reciprocal discipline imposed by the BIA or by this court based on the State Bar Court's suspension order is invalid because the Supreme Court of California lacked jurisdiction to discipline him. He claims that federal law preempts the states' authority to regulate attorneys, like him, who practice only in the administration of immigration law and in the federal courts, but not in the state courts. Because both of these proceedings involve the same underlying preemption issue, we consolidate them for opinion purposes only.

We conclude that federal law does not preempt the Supreme Court of California's authority to suspend or disbar attorneys admitted to practice in California state courts. The Supreme Court of California's discipline orders may serve as the basis for reciprocal disbarment actions by both the BIA and this court. We disbar Gadda from the practice of law before the United States Court of Appeals for the Ninth Circuit."

United States v. Liang, No. 02-10549 (9th Cir. March 31. 2004). "We must decide whether extraordinary eyesight may be considered a 'special skill' supporting an enhanced sentence in a casino card cheating scheme."

"No matter how much it contributed to his ability to peek at cards, Liang's extraordinarily acute vision cannot be described as a skill. And because substantial training or education is what makes a skill 'special' for purposes of § 3B1.3, Liang's visual acuity is simply irrelevant to the question of whether he should be subject to the enhancement. Accordingly, the district court also erred by considering this factor."

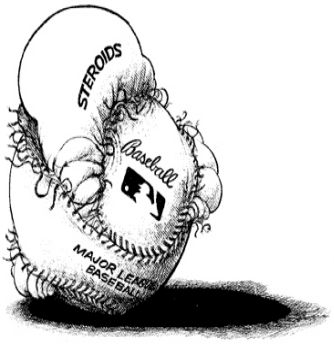
United States v. Mack, No. 03-10204 (9th Cir. March 30, 2004). "Leroy Roosevelt

Mack appeals his conviction and sentence for distribution of cocaine base after a trial in which he represented himself. *See* 21 U.S.C. § 841(a)(1). Mack asserts that the district court erred when it truncated the trial proceeding by excluding him from the courtroom and then denying him the right to call witnesses and the right to present closing argument. We agree and reverse."

Jackson v. Giurbino, No. 02-57117 (9th Cir. March 26, 2004). "A jury convicted California state prisoner Frederick L. Jackson of rape and first-degree murder with special circumstances following his trial in state superior court. Because Jackson did not personally commit the homicide in this case, his conviction depended on application of California's felony-murder doctrine. Jackson appeals from the district court's denial of his petition for the writ of habeas corpus under 28 U.S.C. § 2254, seeking to vacate his conviction and sentence of life in prison without the possibility of parole.

Jackson made many allegations of error in the state court proceedings. First, Jackson claims that the state court unreasonably admitted evidence in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). Second, he argues that the trial court improperly allowed the jury to hear unredacted excerpts of an audiotape alluding to Jackson's criminal history. Third, Jackson alleges that he received ineffective assistance of counsel in the state proceedings. Fourth, Jackson alleges prosecutorial misconduct in that the prosecutor commented on Jackson's silence in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976) , and referred to him as an "animal." Finally, Jackson claims that the sum of the alleged violations amounts to cumulative error.

We do not grant relief on the basis of *Doyle* error because Jackson did not object at trial to the prosecutor's remarks. However, we agree with Jackson's claim of prejudicial *Miranda* error. Therefore, we grant his petition for the writ of habeas corpus and vacate his felony-murder conviction. After a careful review of the record, we find Jackson's other claims without merit, and dismiss them without further discussion. We leave Jackson's conviction on the rape charge undisturbed and permit the state court to revoke its suspension of his sentence for that crime."



United States v. Naghani, No. 02-50168 (9th Cir. March 26, 2004). "Sixteen days after September 11, 2001, Javid Naghani, a passenger on Air Canada Flight 792, went to the lavatory shortly after take-off from Los Angeles International Airport and lit a cigarette, setting off a smoke alarm. When flight attendants came to investigate, a verbal confrontation ensued, beginning with Naghani's initial refusal to admit to smoking or reveal where he had put whatever had caused the smoke and concluding with Naghani's purported threat that either he or his people would 'kill all Americans.' Naghani, an Iranian national and United States resident alien who speaks with an accent, denied making these remarks or

refusing to cooperate.

A jury nonetheless convicted him, and the district court sentenced him to 33 months imprisonment for interfering with the duties of flight attendants in violation of 49 U.S.C.§ 46504. Naghani now appeals on five grounds, arguing that: (1) § 46504 is unconstitutionally void for vagueness as applied to some of his actions; (2) the jury may have relied on an impermissible legal theory in convicting him; (3) there was insufficient evidence to support his conviction; (4) the district court erroneously failed to instruct the jury that it could convict him for a lesser included offense — smoking on the airplane; and (5) the district court incorrectly applied the term 'recklessly' under United States Sentencing Guidelines § 2A5.2. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), and we affirm."

United States v. Bynum, No. 03-10231 (9th Cir. March 26, 2004). "Michael Bynum appeals his conviction and 77-month sentence following a conditional guilty plea to one count of being a felon in possession of firearms in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Bynum contends that the district court erred by denying his motion to suppress the pistol and the semi-automatic shotgun that North Las Vegas Police Department officers discovered in his apartment during the execution of a search warrant. Bynum first asserts that NLVPD officers failed to comply with the 'knock and announce' requirement when executing the search warrant.

Second, he contends that the seizure of the firearms was unlawful under the 'plain view' doctrine. However, because the record establishes the existence of exigent circumstances threatening officer safety, the officers' no-knock entry violated neither the Fourth Amendment nor 18 U.S.C. § 3109.

We lack jurisdiction to reach the merits of Bynum's 'plain view' argument because he did not properly raise the issue before the district court nor preserve it in his plea agreement. We affirm."

United States v. Bautista, No. 02-50664 (9th Cir. March 26, 2004). "We must now determine whether a registered occupant of a motel room retains a legitimate expectation of privacy in the face of an unconfirmed report that a stolen credit card number was used to reserve the room. If so, the police officer's entry into the motel room was a warrantless intrusion, unsupported by probable cause, which was not salvaged by Mrs. Bautista's subsequent consent to entry. We must also address Bautista's contention that his confession, although preceded by Miranda warnings, was nevertheless involuntary.

Having considered our admittedly scant precedent, we conclude that, because Bautista was not evicted from his motel room by the manager, he retained a legitimate expectation of privacy at the time of the warrantless entry by the police. Because the entry was not supported by probable cause, Mrs. Bautista's consent to the entry did not remedy the Fourth Amendment violation. Accordingly, we vacate the district court's denial of Bautista's motion to suppress the evidence obtained during the search of the motel room, and remand for further proceedings."

United States v. Kunin, No. 02-50350 (9th Cir. March 25, 2004). "The question we must decide is whether the statute of limitation begins to run on the day of the last overt act in furtherance of a conspiracy, or the following day. Agreeing with the Second and Eleventh Circuits, we hold that when computing the time within which a

prosecution for conspiracy may be commenced, the statute of limitation begins to run the day *after* the last overt act is committed. Our holding AFFIRMS the conviction in this case."

United States v. Batterjee, No. 03-10152 (9th Cir. March 24, 2004). "Abdulraouf Shahir Batterjee appeals from the judgment of conviction for being a non-immigrant alien in possession of a firearm and a non-immigrant alien in possession of ammunition in violation of 18 U.S.C. §§ 922(g)(5)(B), 924(a)(2). He contends that because federal officials affirmatively misled him as to his eligibility to possess firearms and ammunition under § 922(g)(5), the district court erred in rejecting his affirmative defense of entrapment by estoppel. We reverse because we conclude that the undisputed evidence establishes the defense of entrapment by estoppel."

United States v. Rios-Beltran, No. 03-30177 (9th Cir, March 24, 2004). "The issue presented by this case is whether a prior conviction for a criminal offense under Oregon law is properly viewed as punishable by more than one year's imprisonment — and thus treated for federal sentencing purposes as a prior conviction for a 'felony' — when the statutory maximum for that offense under Oregon law exceeds one year but the sentence that can be imposed under the Oregon's sentencing guidelines does not."

"Rios-Beltran contends that, under Oregon's sentencing guidelines, he could not have been sentenced for the prior conviction to a period of imprisonment longer than one year, so his prior conviction could not properly be treated as a felony. We conclude that it is the statutory maximum, not the range of sentences applicable under the Oregon sentencing guidelines, that determines whether a given offense qualifies as a felony for this federal sentencing purpose. We thus affirm the sentence imposed by the district court."

Ceballos v. Garcetti, No. 02-55418 (9th Cir. March 222, 2004). "Richard Ceballos filed this action pursuant to 42 U.S.C. § 1983 contending that he was subjected to adverse employment actions by his supervisors at the Los Angeles County District Attorney's Office in retaliation for engaging in speech protected by the First Amendment. He also asserts that the county fails to train, supervise, and discipline its district attorneys regarding such unlawful retaliation. The district court granted a motion for summary judgment in favor of the individual defendants—the District Attorney (in his individual capacity), the then-Head Deputy District Attorney, and Ceballos's immediate supervisor—on the basis of qualified immunity, and granted a separate motion for summary adjudication in favor of the county defendants—the county and the District Attorney (in his official capacity)—on the basis of Eleventh Amendment immunity. Given that the disputed facts must be resolved in Ceballos's favor and that all inferences that may reasonably be drawn must also be drawn in his favor, we reverse the district court's rulings. We hold that, for purposes of summary judgment, qualified immunity was not available to the individual defendants because the law was clearly established that Ceballos's speech addressed a matter of public concern and that his interest in the speech outweighed the public employer's interest in avoiding inefficiency and disruption. Because the Eleventh Amendment does not apply to political subdivisions of the state, the county could ordinarily not assert sovereign immunity, although in this case it could do so if such

immunity applied to the District Attorney. Whether the District Attorney, when acting in his official capacity, is entitled to such immunity depends on whether he was performing a state or a county function when he took the alleged actions with respect to Ceballos. We hold that in most respects he was acting in the latter capacity. Thus, he is not entitled to Eleventh Amendment immunity, and neither is the County."

United States v. Sarbia, No. 03-10276 (9th Cir. March 22, 2004). "Maquel Sarbia appeals from the sixty-three-month sentence imposed in this matter following his conviction for possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). The district court adjusted Mr. Sarbia's sentence upward pursuant to section 2K2.1(a)(4)(A) of the United States Sentencing Guidelines Manual. Mr. Sarbia claims that the district court erred in determining that his prior 1994 Nevada state court conviction of attempting to discharge a firearm at an occupied structure was a 'crime of violence' as defined by section 4B1.2 of the USSG. We affirm because the Sentencing Guidelines and our prior precedent treat attempted com-mission and commission of an offense the same."

Caswell v. Calderon, No. 02-17177 (9th Cir. March 18, 2004). "On this appeal from the District Court's denial of a habeas corpus petition and denial of leave to amend the petition, we are presented with two issues. First, is the claim of petitioner Steven H. Caswell that the California Board of Prison Terms violated the Ex Post Facto Clause when it calculated his term of confinement moot, because he has already served the sentence the Board initially imposed and remains in prison only because the Board subsequently rescinded his parole release date? Second, should the petitioner be granted leave to amend his petition to add new constitutional claims?

We have jurisdiction under 28 U.S.C. § § 1291 and 2253 and we affirm in part and reverse in part. In doing so, we hold that:

(1) Caswell's Ex Post Facto claim is moot, and thus it is unnecessary to address the merits of that claim.

(2) Caswell should be granted leave to amend his habeas petition to add a due process claim, but not an equal protection claim."

Doe v. Tandeske, No. 99-35845 (9th Cir. March 17, 2004). "This is the second time this case has been before this court. *See Doe v. Otte,* 259 F.3d 979 (9th Cir. 2001), *rev'd and remanded*, *Smith v. Doe*, 538 U.S. 84 (2003). The first time, we overturned the district court's grant of summary judgment to the State and held that Alaska's sex offender registration and notification statute, 1994 Alaska Sess. Laws 41, violated the Ex Post Facto Clause as to plaintiffs who

were convicted of crimes before the enactment of the statute. Our resolution of the Does' ex post facto claim made it unnecessary for us to decide at that time whether the Act violated plaintiffs' procedural and substantive due process rights. However, the subsequent reversal of *Doe v. Otte* by the Supreme Court in *Smith v. Doe* now requires us to address those claims."

"Because we do not believe that Glucksberg and *Smith* permit us to reach any other result in this case, we conclude that the Alaska law does not violate the Does' rights to substantive due process."

Embury v. Talmadge, No. 02-15030 (9th Cir. March 16, 2004). "We determine here the breadth of a state's waiver of Eleventh Amendment immunity when it removes a case from state to federal court."

"*Estes* noted that, under *Lapides*, a state's motive for removing the case does not matter. We agree. The district court was quite correct that, in the circumstances of this case, allowing the reassertion of Eleventh Amendment immunity, after the State had litigated extensively in federal court but began to anticipate an unfavorable outcome, would waste the time and money of the litigants and the resources of the courts. But even without that circumstance, removal itself affirmatively invokes federal judicial authority and therefore waives Eleventh Amendment immunity from subsequent exercise of that judicial authority, in this case over claims added in the amended complaint. The removal is the waiver, regardless of whether, as in *Hill v. Blind Industries*, the waiver could also have been effected by subsequent events. Allowing a State to waive immunity to remove a case to federal court, then 'unwaive' it to assert that the federal court could not act, would create a new definition of chutzpah. We decline to give the State such unlimited leeway, and instead hold to a straightforward, easy-to-administer rule in accord with *Lapides*: Removal waives Eleventh Amendment immunity."

Martin v. City of Oceanside, No. 02-56177 (9th Cir. March 11, 2004). "Mark Martin sued the City of Oceanside, California and police officers Shawn Kelly and Benjamin Ekeland under 42 U.S.C. § 1983. He alleged that the officers violated his Fourth Amendment rights during an incident in which they entered Martin's home without a warrant in order to check on the welfare of an occupant. The district court determined that the officers were entitled to qualified immunity, and thus granted their motion for summary adjudication. The court also granted the City's motion for summary adjudication on the ground that the City's officers had not committed a constitutional violation. Martin appeals the district court's specific determination that the officers were entitled to qualified immunity based on the 'emergency aid' exception to the Fourth Amendment warrant requirement."

"As discussed in the previous section, the officers reasonably believed that someone inside Martin's home was potentially in need of help, and they were motivated by a desire to assist that person rather than gather evidence. The officers' reasonable belief that Traci may have been in need of assistance inside the home justified their visit and subsequent entry. Citizens in the City of Oceanside would have been justifiably outraged if the officers had delayed their community caretaking responsibilities only to discover later that Traci had become the victim of an otherwise preventable crime or was in need of assistance. The district court's order, granting summary adjudication to the officers and the City as to the 42 U.S.C.

§ 1983 claims, is AFFIRMED."

United States v. Barajas-Avalos, No. 02-30301 (9th Cir. March 10, 2004). "Piedad Barajas-Avalos was convicted of conspiracy to manufacture methamphetamine and attempting to manufacture and manufacturing methamphetamine in violation of federal law. He was sentenced to serve concurrent sentences of imprisonment for 360 months. He seeks reversal of the judgment of conviction on the ground that the court erred in denying his motion to suppress the evidence seized pursuant to a search warrant. Mr. Barajas-Avalos contends that the facts relied upon by the magistrate judge in issuing the warrant were derived from earlier observations made by law enforcement officers by means of an unwarranted trespass onto his thirty-acre parcel of rural land and the natural clearing surrounding his travel trailer. Mr. Barajas-Avalos also challenges the district court's sentencing decision. He contends that the court erred in denying his motion for a downward departure. He also asserts that the sentence imposed by the court is cruel and unusual punishment because he is not a recidivist felon. We affirm the judgment of conviction because we conclude that probable cause existed for the issuance of the search warrant. We dismiss the portion of the appeal from the district court's denial of a downward departure for want of appellate jurisdiction to review the order. We affirm the sentence of 360 months because we conclude it was not grossly disproportionate to the crimes committed by Mr. Barajas-Avalos."

Robinson v. Ignacio, No. 02-17298 (9th Cir. March 10, 2004). "This case requires us to consider (1) whether the application of a Nevada state procedural default bar also serves under the adequate and independent state ground doctrine to preclude our consideration in a federal habeas proceeding of an alleged Sixth Amendment violation, and (2) whether it is a violation of 'clearly established federal law' for a trial court to deny a defendant's request for counsel at sentencing simply because of his prior waiver of the right to counsel at trial. Nevada state prisoner Antonio Darnell Robinson appeals the District Court's denial of his 28 U.S.C. § 2254 petition, in which he challenges the state sentencing proceedings that adjudicated him a habitual criminal and sentenced him to life without parole. Robinson argues that the state trial court violated his Sixth Amendment right to counsel when the court denied his timely request to be represented during sentencing. Before we reach this issue, we must determine whether Nevada Revised Statute) § 34.810(1)(b)(2) procedurally bars Robinson from asserting his Sixth Amendment claim in this § 2254 petition. Because we believe that the claim is not barred, and because we hold that under clearly established federal law, the state trial court's denial of Robinson's request did violate the Sixth Amendment, we reverse and direct the district court to grant the writ and remand Robinson's case for re-sentencing."

United States v. Barajas, No. 02-10668 (9th Cir. March 9, 2004). "Jesus Cordova Barajas appeals from the judgment entered following his conviction by a jury for aiding and abetting the cultivation of marijuana in violation of 21 U.S.C. § 841(a)(1), and 18 U.S.C. § 2. He also appeals his 210-month sentence. Mr. Barajas claims that the evidence presented at trial was insufficient to support his conviction. He also asserts that the district court erred in not adjusting his offense level score downward based on his minor role in the offense pursuant to

section 3B1.2 of the U.S. Sentencing Guidelines Manual, and in adjusting his offense level score upward two levels for obstruction of justice pursuant to section 3C1.1 of the USSG. We affirm the judgment of conviction because we conclude that the evidence was sufficient to persuade the jury of his guilt. We also find no error in the district court's sentencing decision."

United States v. Tapia-Marquez, No. 03-50167 (9th Cir. March 9, 2004). "We hold today that a criminal defendant, whose appeal of a judgment revoking his supervised release became moot when he was released from custody while the appeal was pending, is not entitled to vacatur of the judgment where existing precedent squarely foreclosed the only issue he raised in his appeal."

San Jose Christian College v. City of Margan Hill, No. 02-15693 (9th Cir. March 8, 2004). "The clash between land use regulations and religiously-affiliated landowners continues. In this case, the City of Morgan Hill denied a re-zoning application submitted by San Jose Christian College. Because we conclude that the City's determination did not violate College's right to the free exercise of religion, or otherwise run afoul of the Constitution, we **AFFIRM** the district court's grant of summary judgment in favor of the City."

"A law is one of neutrality and general applicability if it does not aim to 'infringe upon or restrict practices because of their religious motivation,' and if it does not 'in a selective manner impose burdens only on conduct motivated by religious belief[.]' *Lukumi,* 508 U.S. at 533, 543. The ordinance and its application by the City fall within these parameters. The record reflects that the city's zoning ordinance applies throughout the entire City, and there is not even a hint that College was targeted on the basis of religion for varying treatment in the City's application of the ordinance. We are left, then, with the unavoidable conclusion that the incidental burden upon College's free exercise of religion is not violative of the First Amendment."

"Counsel, your pleadings just suck."

FEES: Philadelphia Magistrate Judge Reduces Hourly Rate for Fee Award for Lawyer's Atrocious Writing. The lawyer, whom we shall not identify, won a jury verdict for a plaintiff in a Title VII/Section 1983 case. But his written work was so bad that the magistrate judge cut his fee for that work from $300/hour to $150/hour. His pleadings were vague, incomplete and replete with typos. Problems with the lawyer's original complaint were so serious that the court had ordered the lawyer to file an amended complaint. But the amended complaint included portions that were "nearly unintelligible." Even in a letter to the court the lawyer misspelled the judge's first name as "Jacon," when it should have been "Jacob." In fact, there were even typos (quoted by the court) in the lawyer's response to the other side's attacks on the quality of his written work product. The court was ticked. In DeVore v. City of Philadelphia, 2004 U.S. Dist. LEXIS 3635 (E.D. Pa. Feb. 20, 2004), appeared the following: ". . . Mr. [Lawyer's] complete lack of care in his written product shows disrespect for the court." In contrast to his written work, the court found the lawyer's courtroom work to be quite workmanlike and allowed $300/hour for that work. "[T]he court was impressed with the transformation."

DeVore v. City of Philadelphia, 2004 U.S. Dist. LEXIS 3635 (E.D. Penn. Feb. 20,

2004)
<http://www.ethicsandlawyering.com/Issues/files/DeVore.pdf>

Oregon county bans all marriages. Benton County, Ore., has added a new dimension to the roaring debate over same-sex marriages. According to Reuters, the county's three commissioners voted on Monday to halt both gay and heterosexual marriages until Oregon "decides who can and who cannot wed." County officials now tell couples who apply for marriage licenses to "go elsewhere until the gay marriage debate is settled," Reuters reports. "It may seem odd," Benton County Commissioner Linda Modrell told Reuters. But, "we need to treat everyone in our county fairly." For more information, visit here.

IT@ Wechsler Harwood: Why We Monitor Our Staff's Web Use

By Daniella Quitt

The Internet is vast and infinite. What Wechsler Harwood learned recently is that disk space and bandwidth are not.

Leaving the Internet open for everyone to use for every purpose can eventually cause problems — including data storage issues and degraded Internet speed. Fortunately, we discovered these issues and took precautions before any real problems occurred.

Wechsler Harwood is a New York City-based law firm of 15 attorneys who focus on securities litigation. When our firm was first "wired," we granted full Internet access to everyone (30 people) because we saw the value that the Internet brought to our research capabilities, as well as to our ability to collaborate with clients and colleagues.

We knew the Internet would be put to personal use from time to time, just like the telephone. We did not, however, realize the damage that this *laissez-faire* policy could incur.

This issue came to light when our systems integrator, Exigent Technologies of Parsippany, N.J., notified us that our nightly system backups were taking an extraordinary amount of time and space.

Exigent worried that if a disaster hit, system recovery could be a very lengthy process, because of the amount of data and size of our backups.

We asked Exigent to investigate the cause of the lengthy backup jobs. The analysis uncovered the presence of a large number of nonbusiness-related media files stored on the firm's network.

While we had not experienced any discernible degradation in Internet speed or shortage of disk space, we realized that we could have a resource problem in the near future if the current rate of data growth continued.

Exigent advised us to use employee Internet monitoring (EIM) software. Of the handful of packages available, they recommended Websense, from San Diego's Websense Inc., because it offered features that were particularly well-suited to our needs: the ability to block Web sites by category, and reporting and logging capabilities.

Using Websense, we blocked peer-to-peer music sharing sites such as KaZaa, as well as alleged spyware programs such as Claria Corp.'s (née The Gator Corp.) Gator eWallet, and Bonzi Software Inc.'s Bonzi Buddy.

Music files (a.k.a. MP3s), which can exceed 5 MB each, fill disk space quickly and are often the source of viruses. Other Web applications will "comparison shop" for any product you happen to be viewing, grabbing precious Internet bandwidth.

While the software has the ability to make exceptions on an individual basis, generally we exercise control at the category level, with everyone having the same privileges. Perpetual updates from Websense keep the software current without our having to monitor it.

We set up Websense to monitor and control the volume of Web traffic, too.

The full bandwidth is available to everyone, but certain types of traffic are reduced automatically to a lower priority during periods of heavy demand.

That way, important tasks like electronic filings with the court or online collaboration with a client take precedence over other less critical activity.

Installation of the software took the Exigent Technologies team less than a day. Because Websense offers a 30-day trial period, we were able to test the software, and fine-tune it to our specific application, before making a final decision about buying it.

Our experience shows that a small firm needs to monitor its Internet resources just as diligently as a large firm. Employees are largely unaware of the cost their Internet usage can have on a firm's network, production schedule, and equipment costs. Fortunately, Websense was available to help us before any major problems surfaced, and it continues to help us control Internet usage, without depriving our firm employees of Internet access entirely.
http://www.lawtechnews.com/r5/home.asp

OTHER CASES

United States v. Bonner, No. 03-1547 (3d Cir. March 30, 2004). Because vehicle-passenger's flight prevented the police from maintaining oversight and control over the non-consensual, legitimate traffic stop, police had reasonable suspicion to stop him.
http://caselaw.lp.findlaw.com/data2/circs/3rd/031547p.pdf

United States v. Campos, No. 03-1329 (8th Cir. April 01, 2004). District court erred as a matter of law in concluding defendant intended 25% of methamphetamine for personal consumption when petit jury found otherwise. Allowing both acceptance of responsibility reduction and obstruction of justice enhancement was clear error, as the case was not extraordinary.
http://caselaw.lp.findlaw.com/data2/circs/8th/031329p.pdf

United States v. Parker, No. 03-4119 (10th Cir. March 24, 2004). The Second Amendment does not bar defendant's prosecution under the Assimilative Crimes Act for carrying a loaded weapon onto a federal reservation in his vehicle; the Tenth Amendment is not violated when the federal government acts to enforce a Utah law which is violated on a federal enclave.
http://laws.lp.findlaw.com/10th/034119.html

United States v. Gould, No. 02-30629 (5th Cir. March 24, 2004). District court erred as a matter of law in holding that a protective sweep can never be valid unless incident to an arrest, and on that sole basis granting the motion to suppress.
http://caselaw.lp.findlaw.com/data2/circs/5th/0230629cv0p.pdf

Psinet, Inc.. v. Chapman, No. 01-2352 (4th Cir. March 25, 2004). In light of current technology, Va. Code Ann. section 18.2-391, which criminalizes the dissemination of material harmful to minors over the Internet, violates both the First Amendment and the Commerce Clause.
http://caselaw.lp.findlaw.com/data2/circs/4th/012352pv2.pdf

Saldano v. Roach, No. 03-40905 (5th Cir. March 23, 2004). Because the District Attorney does not have a direct, substantial, and legally protectable interest in these habeas proceedings, and any interest he does have is adequately represented by the Attorney General, the district court properly denied his application for intervention under FRCP rule 24(a)(2). The District Attorney's appeal of the district court order granting habeas relief is dismissed.

http://caselaw.findlaw.com/data2/circs/5th/0340905cv0p.pdf

Wiley v. City of Chicago, No. 03-1490 (7th Cir. March 22, 2004). Plaintiff's Fourth Amendment claim for false arrest must be reinstated. Though the two-year statute of limitations in such cases normally runs from the time of arrest, if, as alleged, plaintiff was arrested and prosecuted solely on the basis of drugs planted by the arresting officers, his claim would not begin to accrue until the charges were dismissed.

http://caselaw.lp.findlaw.com/data2/circs/7th/031490p.pdf

Linbrugger v. Bbercia, No. 02-21300 (5th Cir. March 22, 2004). Defendants are entitled to qualified immunity on plaintiff's unlawful entry claim. Noncompliance with the knock-and-announce rule was reasonable, given that plaintiff was a known threat to himself and others, had sworn on that same day to kill his sister, and used "The Club" to emulate the sound of a shotgun being primed before raising it and opening the door.
http://caselaw.findlaw.com/data2/circs/5th/0221300cv0p.pdf

United States v. Mayo, No. 03-4529 (4th Cir. March 23, 2004). Officers in a high-crime area had authority to stop and frisk defendant after observing him react to their presence by placing his hand in his left hand jacket pocket - indicating to them that it might contain a gun - and thereafter conduct himself in an evasive, suspicious, palpably nervous manner.
http://laws.lp.findlaw.com/4th/034529p.pdf

Walton v. Briley, No. 01-2928 (7th Cir. March 17, 2004). Defendant did not waive his right to a public trial by failing to object at the trial, two-thirds of which was held after-hours in a locked courthouse. District court erred in denying his habeas petition.
http://caselaw.lp.findlaw.com/data2/circs/7th/012928p.pdf

Sweeney v. Carter, No. 02-2165 (7th Cir. March 15, 2004). Because the US Supreme Court has not established a Fifth Amendment right to effective assistance of counsel, the district court properly dismissed this habeas petition, arising from the attorneys' mistaken advice about an alleged use-immunity agreement.
http://caselaw.lp.findlaw.com/data2/circs/7th/022165p.pdf

Florida v. Robinson, No. SC01-2620 (Fla. March 18, 2004). The Florida Sexual Predators Act, which requires certain defendants to register as sexual predators and limits their employment opportunities, is unconstitutional as applied to a defendant whose crime indisputably did not contain a sexual element.
http://caselaw.lp.findlaw.com/data2/floridastatecases/3_2004/SC012620p.pdf

Speights v. Frank, No. 03-2646 (7th Cir. March 19, 2004). Prisoner's claim that he was denied assistance of counsel was properly rejected. When he dismissed his lawyer to prevent the filing of a no-merit report, he waived any entitlement to

appellate counsel; defendants do not have a right to appellate counsel who pretend that frivolous arguments actually are meritorious. http://caselaw.lp.findlaw.com/data2/circs/7th/032646p.pdf

United States v. Hilton, No. 03-1741 (1st Cir. April 02, 2004). Child pornography conviction under 18 U.S.C. section 2252A(a)(5)(B) requires the government to present evidence proving that the child in the image is not confabulated, but real; expert testimony as to the ages of the depicted children was inadequate to meet this burden, thus post-conviction relief was properly granted. http://laws.lp.findlaw.com/1st/031741.html

United States v. Gerard, No. 03-1655 (8th Cir. April 02, 2004). Police officer who, without a warrant, climbed a ladder and tried to peer through the vent of a locked garage next to a farmhouse did not conduct an illegal search. District court did not clearly err in finding the garage was not within the farmstead's curtilage.

http://caselaw.lp.findlaw.com/data2/circs/8th/031655p.pdf

Vanguard's Economic Week in Review: March 29-April 2, 2004

Economic reports released during the week were very optimistic,especially the Labor Department's employment report released Friday. The number of jobs created in March was well above expectations, manufacturing showed continuing strength, inflation at the wholesale level was tame, and consumer sentiment was stable. In the financial markets, stocks rose for the week, while bond prices fell sharply. The S&P 500 Index rose 3.0% to 1142. The yield of the 10-year U.S. Treasury note rose 31 basis points to 4.14%.

Nonfarm payrolls increased by 308,000 in March, roughly three times what analysts expected and almost seven times February's 46,000 gain. The exceedingly upbeat payroll increase--the highest since April 2000--was long awaited by economists. Some of the largest gains were in construction, health care, and retail trade, whose tally included grocery employees returning to work after a protracted strike, according to the Labor Department's survey of establishments. However, the department's separate survey of households indicated that the unemployment rate rose slightly to 5.7%. Although the number of unemployed rose marginally in the equation, the primary reason for the increase was a rise in the labor force; in other words, 182,000 additional people were actively looking for jobs.

Today's Word:
Iatrogenic *(Adjective)*

Pronunciation: [I-æ-trê-'jin-ik]

Definition 1: Caused by a doctor, contracted in a medical facility (said of a disease or disorder).

Today's Word:
Dwam *(Noun)*

Pronunciation: ['dwæm]

Definition 1: 1) A fainting fit, a swoon; 2) a daydream

www.dictionary.com